No. 14,335

IN THE

United States Court of Appeals

For the Ninth Circuit

JOANN A. VAN DOLAH, by Anne T. Van Dolah Gordon, Mother and Next Friend,

Appellant,

vs.

SALVATORE MELE, MYRTLE HOLLMAN and CHARLES J. BRADY, Partners, doing business as The Red Cab Company,

Appellees.

Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEES.

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I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken from a final judgment rendered on the 27th day of January, 1954, by the District Court for the District of Alaska, Third Division,

in favor of the appellees (defendants in the lower court) and against the appellant.

The District Court for the District of Alaska is a Court of general jurisdiction consisting of four Divisions, of which the Third Division is one. Jurisdiction of the District Court is conferred by title 48 U.S. Code Section 101. See also, Alaska Compiled Laws Annotated, 1949, 53-1-1 and 53-2-1. Practice or procedure of the District Court since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure, which were extended to the Courts of the Territory of Alaska on that date. 63 Stat. 445, 48 USCA 103-A.

Jurisdiction of this Court to review the judgment of the District Court is conferred by new Title 28 USC Sections 1291 and 1294 and is governed by the Federal Rules of Civil Procedure.

II.

STATEMENT OF FACTS.

On the evening of October 5th, 1951, between the hour of 5 and 5:30 o'clock (R 230-172) Leonard W. Roberts, in the employment of the appellees, a co-partnership doing business as the Red Cab Company, having picked up a fare in the persons of Harold Munson and his wife, at or near the Elks Club in the City of Anchorage (R 237), proceeded in a southerly direction along L Street out of the City of Anchorage

toward the adjacent community known as Spenard (R 230) located south of Anchorage, and while proceeding along the extension of L Street, which is known as Spenard Road as it extends south of the City of Anchorage Boundaries, struck or collided with the appellant, Joann Van Dolah, a female child of the age of nine years, as she suddenly appeared from behind a parked car (R 232). The accident happened just shortly after the cab crossed Chester Creek on Spenard Road proceeding up Romig Hill. Although appellant's witness testified lights were optional, the cab was proceeding with lights, either parking or headlights (R 234).

The evidence shows that the accident took place during the twilight hours of the day (R 69) and that the vehicle driven by Leonard W. Roberts was operated at a rate of speed of approximately 15 to 20 miles per hour (R 232). The cab was stopped after the impact within less than the length of the vehicle (R 232-234).

The evidence shows (R 177) that there was heavy traffic going in both directions (R 236) and that there were ten or fifteen cars, including the cab in question, directly behind a bus, and there was still a line of traffic in back of the Red Cab (R 236); that as the string of traffic proceeding up Romig Hill at 15 to 20 miles per hour (R 232) the appellant, Joann Van Dolah, without looking (R 181) ran out from in front of a parked car (R 230) and was hit by the right front fender of the cab. The impact threw her some 15 to 20 feet ahead of the cab (R 230-231).

From the undisputed evidence, the appellant Joann Van Dolah was established to be a cautious girl of nine years (R 142) being frequently trusted to cross the street and shepherd the younger children of a neighbor (R 158). No one of appellant's witnesses, save and except possibly Richard Lobdell, who saw nothing prior to the impact (R 67), actually saw the accident or the collision between Joann Van Dolah and the Red Cab. The girl herself saw no cab and stated that she looked in both directions (R. 144) prior to the accident.

By reason of the injuries sustained by the girl, plaintiff below sought damages. After a dismissal of the suit as to Leonard W. Roberts because of want of service, and on this state of facts, the question was submitted to the jury, which duly returned a verdict in favor of the defendants, appellees herein. Upon the denial of appellant's motion for a new trial, this appeal is taken.

III.

SUMMARY OF ARGUMENT.

The appellees submit that the Court should have granted appellees' motion for a directed verdict made at the close of plaintiff's evidence and renewed at the close of all evidence (Vol. 1 Record, 19). If appellees are correct in this position, then it is urged by the appellees that in fact no instruction, however improper, could be prejudicial to the appellant's case,

which was not entitled to go to the jury in the first place. The appellees will in this brief, without waiving their primary position as above set forth, follow the order of appellant's brief for the sake of convenience.

The appellant has claimed that the District Court erred in the following respects:

(1) That the appellant claims that the District Court has erred in giving certain instructions. It is to be noted that while exception was taken to the Court's instructions 1, 2, 4, 5, 6, 8, 10 and 11, that the appellant in her brief, has treated only with instructions 5, 6 and 10 and has further treated with the failure of the Court to give plaintiff's offered instructions Nos. 6 and 7 and accordingly, only those particular instructions which are noted in the brief of the appellant will be considered for the purpose of this brief. It is to be noted that the Court granted appellant's exception as to instruction No. 1.

The appellant takes exception to the instruction No. 6 given by the Court and in appellant's argument No. 1, appellant recites only a portion of said instruction, which in its entirety reads as follows:

> "Negligence is never presumed. The presumption of law is that persons act with due care for the safety of other persons and their own safety. This applies both to negligence charged by the plaintiff against the defendants and also to the averment of contributory negligence made by the defendants as to the acts of Joann Van Dolah. A mere surmise that there may have been negli-

gence on the part of one or more of the defendants or on the part of Joann Van Dolah, or the mere fact that an accident happened wherein Joann Van Dolah was injured, do not in and of themselves entitle the plaintiff to a verdict against the defendants or any of them nor serve as actual proof that the child Joann Van Dolah was guilty of contributory negligence.

You are instructed that no verdict can rightfully be given against any of the defendants unless a preponderance of the evidence shows that such defendant was negligent and that his negligence, under these instructions, was the proximate cause or one of the essential elements of the proximate cause of the injuries to Joann Van Dolah. Without negligence there is no liability. The burden is upon the plaintiff to prove the negligence of the defendants and the defendants are not required to prove that they were without negligence."

It is contended by the appellees that the instruction above given is not a unilateral instruction, but is in fact a bilateral statement, as favorable to the plaintiff as it is to the defendants. Appellees further contend that appellant recites the instruction piecemeal and out of context.

(2) In appellant's argument No. 2, appellant urges that the Court erred in giving instruction No. 10, a part of which instruction is set forth in appellant's brief. The entire instruction as given by the Court reads as follows:

"A driver of a motor car who is driving in accordance with the governing law and the regula-

tions having the effect of law, is not obligated to anticipate that any person, whether child or adult, will suddenly or unexpectedly dash in the path of his vehicle so that in the exercise of ordinary care, the driver of the car is not able to stop or change the course of his car sufficiently to avoid injury to the pedestrian. In this case, if you find that the defendant Leonard W. Roberts, the driver of the taxicab, was driving said taxi in accordance with the law and the speed and other regulations governing the driving of vehicles on the highway at the place where the accident occurred and that the child suddenly and unexpectedly darted or ran in the path of his vehicle so that it was beyond his power to stop the taxi or to swerve it sufficiently to avoid the child, then the defendants and each of them are not responsible to the plaintiff in this action and your verdict must be for the defendants and against the plaintiff."

To this instruction, the appellant takes exception on the basis that the Court should have instructed that the defendants must anticipate the presence of others, including pedestrians, on the highway (appellant's brief p. 6). The appellant argues that a motorist must expect others upon the highway, which is true, but a motorist may also expect that these other persons will use reasonable care under the circumstances, and therefore appellees contend that the instruction was properly given. The appellant fails to consider and meet in her argument and to interpret the instruction in its entirety for what it means, in that appellant fails to recognize the difference between a motorist

using the highway in a heedless manner and a motorist using the highway in a reasonable and prudent manner, or in the exercise of ordinary care. The appellant's argument further fails to recognize that any person using the highway, be he pedestrian or motorist, is required to use reasonable care for his own safety and the safety of others. The Court's instruction does not excuse a motorist who carelessly uses the highway but does excuse from liability a motorist using and exercising ordinary care, where a pedestrian suddenly darts upon the highway into the path of a vehicle so that it is beyond the power of a driver to stop the taxi or swerve it sufficiently to avoid the pedestrian.

(3) Appellant contends that appellant's offered instructions Nos. 6 and 7 were refused erroneously by the Court, which instructions are set forth in full at page 9 of appellant's brief. The appellant's offered instructions Nos. 6 and 7, without going into the merits or verbiage of the instructions themselves, deal generally with the application of the last clear chance doctrine, which doctrine, in order to be applicable, presupposes contributory negligence on the part of the appellant. The application of the doctrine itself appellees contend is not initiated until and unless it has been established by some substantial evidence that the appellees discovered, or by the exercise of reasonable care should have discovered, the perilous position of the appellant. There is some support for the proposition that the doctrine may be applied if the appellees have not discovered the perilous position of the ap-

pellant if by reasonable or ordinary care appellees should have discovered the peril of the appellant, which latter position is not supported, as appellees believe, by the great weight of authority. Appellees' position is that there was no way for the appellees to discover the peril of the appellant since it was a split-second position of peril at the time the child ran, trotted or ambled at a right angle into the path of the appellees' cab from behind a parked car. There is no error for refusing to give instructions not warranted by the facts.

(4) The appellant further urges that the Court erred in giving instruction No. 5, a part of which instruction is set forth on page 11 in appellant's brief. While the appellant took exception to instruction No. 5 as modified at the request of appellees (R 315) no grounds for taking exception were recited by the appellant in the record. The whole of said instruction as given by the Court reads as follows:

> "You are instructed that some stress has been laid by the plaintiff upon uniform usage, custom or practice on the part of the plaintiff and the children in that vicinity to use the place where the plaintiff testified she crossed the highway as a means of crossing said highway. The defendants deny the existence of such a custom. You are instructed that by the term 'general custom' is meant the general way of doing some particular thing—the usual way of doing such thing. To establish a general custom in reference to any particular thing or way or manner of doing such thing, it must be made to appear from the evi-

dence that such custom was generally and uniformly extended to all persons under like circumstances and conditions, and that the same is notorious; that is, well understood. So if, in the case at bar, it does not appear from the evidence that the children in that neighborhood crossing the Spenard highway at this pint use that particular section of the road as a means of crossing, then the general custom in question in this case is not established.

You are instructed that custom or usage governing a question of legal right cannot be proved by isolated instances, but should be so certain, uniform and notorious that it must probably be understood by the plaintiff at the time she crossed the highway, and by the defendant, Leonard W. Roberts, as he was travelling down the highway at that point. The burden is upon the plaintiff to prove that such a custom existed by a preponderance of testimony; and that the defendants knew or should have known that such custom existed, if you should find that she has failed to establish such a custom by the preponderance of testimony, then, upon that branch of the case, you should not consider it further as having any bearing upon the case, in making up your verdict."

While the appellant states that it was the uncontradicted evidence that the children and grownups in that vicinity crossed the Spenard Road at a point near the foot of Romig Hill, appellant's position is undocumented by any reference to the record. Appellant's only reference to the record in regard to

evidence in chief is contained in the statement of facts in appellant's brief, page 2, which references, read in their entirety, only disclose that an accident happened and that the appellant was injured. Appellees submit that there isn't, even viewing the entire evidence on this point in the most favorable light to the appellant, sufficient evidence to establish a custom or usage unless appellant contends that questions of counsel in this regard are in fact evidence. Such a position is unthinkable. While it is harmless so far as the appellees are concerned, the instruction of custom and usage was, as appellees believe, not warranted by the evidence.

(5) Appellees contend that the Court specifically advised appellant (R 304), (Vol. 1 Record, page 74) that time was available for any proper rebuttal testimony. The record discloses that the appellant not only had an opportunity to put on rebuttal but did in fact call all of her chief witnesses except Dr. Ivy and Richard Lobdell back and took their rebuttal testimony. That the appellant's complaint that she was not allowed time for proper rebuttal testimony is an admission of lack of evidence sufficient to take the case to the jury. The Court did not limit appellant on rebuttal testimony but did in fact properly restrict the nature of the rebuttal to controverting the material testimony of the defense in chief.

While no particular point is made by appellant in respect to prejudicial treatment of appellant's counsel, there is some authority recited in appellant's argument number five, dealing with the law in that respect.

Appellees submit that there is no substantial similarity between the facts in the case at bar and the facts recited in *Collins v. State,* or *Shepard v. Brewer.* It is true that during the appellant's rebuttal, some differences of opinion were expressed in respect to testimony in chief and an expression of the Court that certain statements should not be made before the jury. The only possible reflection that such discussions could have, as appellees believe, is that the jury may have had grave doubts about the powers of mental retention on the part of the Court and both counsel so far as the prior testimony was concerned.

(6) It is the position of the appellees that the question of whether or not a jury should be allowed to view the scene of the accident is within the sound discretion of the Court and that the Court properly exercised its discretion without prejudice to the appellant.

IV.

ARGUMENT.

Upon the trial, appellant in taking exception to the Court's instruction No. 6 stated as follows (R 313):

> "Mr. Bell. I seriously take exception to No. 6, in the last paragraph because it still confines her to only recover if the defendants themselves are negligent, not the agents, servants or employees. That is this instruction No. 6."

Appellant's brief apparently abandons the position for the original exception and seeks other grounds.

Appellant now urges that no valid purpose can be served by raising an assumption of due care in this case. As has been previously pointed out in the summary of argument, supra, the appellees are of the firm conviction that appellant's argument No. 1 is academic in this case as there was, as appellees contend, insufficient evidence to warrant submitting this question to the jury and accordingly, if appellees' position in that regard is well taken, the instruction No. 6 complained of, if incorrect, which is not admitted, would in no wise prejudice the rights of the appellant for the reason that appellant was not entitled to have it go to the jury in the first place.

While appellees feel the argument in connection with the first point raised by appellant is moot, it should be pointed out that the exact instruction, or even a similar instruction, was nowhere treated in any of the case law cited by the appellant. The appellant's cases are based upon a singular instruction, or as we choose to call it, a unilateral instruction, whereas the instruction of the Court here given as instruction No. 6 was a bilateral instruction. In other words it was as fair to the appellant as it was to the appellees in that the instruction applies to both the "negligence charged by the plaintiff against the defendant and also the averment of contributory negligence made by the defendants as to the acts of Joann Van Dolah."

Appellant argues that the instruction given, improperly places the burden of proof, but as will be seen in instruction No. 2 (R Vol. 1 page 32) an in-

struction was given by the Court in respect to the burden of proof, which instruction appellees contend is correct and although exception was taken thereto by appellant, no argument or authority was urged or set forth concerning such instruction in appellant's brief, and accordingly the Court should properly disregard exceptions taken to instruction No. 2 and therefore assume that the instruction was properly given. See *Nelson v. Johnson,* et al., 243 Pac. 646, decided in 1926, in the Idaho Supreme Court, appeal and error, key No. 1078(1).

If appellees correctly understand the academic side of the objection placed by appellant as to instruction No. 6, it could be stated thusly: there is substantial authority in some jurisdictions for the proposition that as against a proved or admitted fact a disputable presumption has no weight.

The most extensive discussion of the rule involving presumption found by the appellees is in *Mar Shee v. Maryland Assur. Corp.,* 190 Cal. 1, 210 Pac. 269. It appears that there are three conflicting positions in respect to presumption. The first one admonishes the trial judge to instruct the jury on all proper occasions

> "that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a * * * presumption".

Secondly, there is the line of cases illustrated by the *Savings & Loan Socy. v. Burnett* case, 106 Cal. 514, 39 Pac. 922, where the rule is stated as follows:

> "Disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled."

The third rule recognizes that:

> "As against a proved fact, or a fact admitted, a disputable presumption has no weight",

and further that

> "Where * * * an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence including the presumption."

The California Court in the *Mar Shee* case then went on with a determination of what a "proved fact" is within the meaning of the rule and in the *Mar Shee* case upon the established or admitted facts that Fong Wing was shot twice in the back by some person unknown was led to the inescapable conclusion that the person who did the shooting intended either to shoot Fong Wing or some other person for whom he mistook Wing, but in either event the killing constituted murder in the first degree and accordingly the facts being proven wholly irreconcilable with the presumption of innocence is dispelled and no evidence remains to support the finding that the insured was not murdered.

Regardless of which of the three rules, all of which apparently became reconciled in the State of California under the ruling of the *Mar Shee* case, is followed, there is a wide breach in the positions of various Courts that range all the way from a holding such as first cited above to the position of that as recited by the appellant in the Minnesota case of *Tepeol v. Larson,* 53 NW (2d) 473. The other extreme is recited in the case of *Clark v. DeMars, et al.,* Supreme Court of Vermont, 1929, 146 Atl. page 812, which, so far as the appellees have been able to ascertain, is still the law of Vermont, where the Court held that it was the established doctrine of that Court that when, in the trial of a civil case, a person is charged with a crime, there is a legal presumption that he is innocent which is evidence in his favor and is to be considered by the jury in connection with the other evidence in the case, and the defendant was entitled to an instruction to that effect. The evidence having called for it, the failure to give it was prejudicial error.

As previously pointed out, the appellees have not been able to discover any cases, either cited by the appellant or discovered by the appellees, which treat with a bilateral instruction of due care giving treatment in the instruction as favorable to the plaintiff as to the defendant, and since, as appellees believe, the instruction was as favorable to the appellant as to the appellees and that the case should never have gone to the jury in the first place, and further that the instruction of due care was not given in the face of a

proven or agreed set of facts but on the contrary there was no substantiated evidence of negligence on the part of the appellees any possible error in instructing was harmless. While the appellant's argument throughout her brief is singularly lacking in documentation except as to argument Nos. 5 and 6, it is obvious that the appellant is urging a moot question deserving of no further treatment on the part of the appellees. The attention of the Court is called to the record, page 232, which clearly indicates that the cab driver was operating his vehicle in a reasonable and prudent manner and was operating it at a speed of between 15 and 20 miles per hour in a continuous string of traffic proceeding in a southerly direction up Romig Hill at the busy hour of the day, and although some automobiles were being operated at this time near sunset without lights, that the cab was in fact being operated with lights, indicating that the cab driver was careful and prudent in his method and means of operation, and the witnesses nowhere dispute this fact. The only witnesses indicating to the contrary are witnesses of the appellant who never saw the accident but attempted to testify as to what was usual and ordinary in respect to the flow of traffic at the particular point of the accident. In view of the fact that Mr. Lobdell was the only witness for appellant who saw any part of the accident, it must be assumed that the jury disregarded his testimony, in view of the question as to his recollection, in that he testified that Joann Van Dolah was removed from the scene of the accident in the fire rescue truck (R 67-

69) while all other witnesses agree that the girl was taken from the scene of the accident in a car belonging to a friend of Mr. McWhorter which was backed up the hill to the scene of the accident (R 35-38) from the easterly side thereof. Viewing the evidence in its most favorable light, appellant did not overcome the presumption which was properly presented to the jury in the bilateral instruction. Certainly where, as in this case, the appellant fails to state in her exception the grounds urged in her brief, the Court would have no proper way of ruling upon the exception and accordingly the argument of appellant in respect to this instruction should not be considered by this Court.

Appellant's argument No. 2 is based upon alleged error in the giving of instruction No. 10, which is fully set forth in the summary of appellees' argument. The effect of appellant's argument is that a driver of a motor vehicle is bound at his peril to anticipate the presence of others including pedestrians on the highway and although not so stated in as many words, we would assume that the appellant urges that such presence must be anticipated under any circumstances. We must urge that the law is to the contrary and this is particularly true in regard to sudden appearance. It must be remembered that Joann Van Dolah appeared suddenly from the right hand side of the road, from behind a parked car, in respect to the direction in which the cab driver was going. The authority is in abundance on the general principle that motor operators must keep their machinery under control so as to avoid collision with others

using the highway with ordinary care and prudence. The Courts have, in nearly all jurisdictions, determined that a sudden appearance of a child or adult clearly excuses the motorist using due care. This position is justified on one of two theories, either that it was an unavoidable accident or that the sudden appearance of the pedestrian or other obstacle violated the use of the highway with ordinary care and prudence. Attention of the Court is called to the case of *Hall's Adm'x. v. City of Greensburg, et al.,* 241 Ky. 279, 43 SW (2d) 660, Court of Appeals of Kentucky, decided in 1931, in which exception was taken to the instruction:

> "If you believe from the evidence that the decedent, Charles Hall, came suddenly from behind the sand bin in evidence and in front of the defendant's car, and so close in front of it that said Mrs. Wilson could not by the exercise of ordinary care and the use of the means at her command, either stop her car or change its course to give said Charles Hall warning of her presence by the usual sign in time to have avoided the collision, then the law is for the defendants, Wilsons, and you should so find."

The effect of the instruction No. 10 complained of by the appellant is almost identical in intent and meaning to the instruction given in the Kentucky case hereinabove mentioned. See also *Haydon, et al. v. Bay City Fuel Co., et al.,* Supreme Court of Washington, 1932, cited at 9 Pac. (2d) 98, where a boy almost 5 years old had been standing behind a mail

box which concealed him. He darted straight across the street, and was struck by a truck going not over 25 miles per hour. The place where the truck started to skid and where it stopped showed that the accident did not occur at a street intersection. There was no proof that the truck driver did not keep a proper lookout, or that sounding the horn would have averted the accident. As soon as he saw the boy the driver did everything possible to avoid the accident.

So likewise in the case at bar the greater weight of the evidence shows that the cab driver was proceeding at a reasonable rate of speed between 15 and 20 miles per hour, that he stopped within the length of his car. The testimony of Harold Munson, a passenger of the cab, is that the right rear door of the cab was just abreast of the front end of the parked car (R 232) from whence the girl made her appearance and proceeded without warning across the busy thoroughfare. While it is contended by the appellant that the accident took place at or near a usual crossing, there is no satisfactory evidence in the record to disclose that such was the case.

See also *Kessler v. Robbins,* 215 Iowa 327, 245 SW 284, Supreme Court of Iowa, decided in 1932, under an almost identical state of facts or perhaps a statement of facts even more favorable to the plaintiff than is here presented, the upper Court sustained a directed verdict for the defendant. We say the facts are more favorable in the Iowa case. The girl from 10 to 11 started suddenly across the street in front

of the defendant and within 5 feet of the defendant's moving automobile. The defendant slowed to a speed of about 15 miles per hour as he approached the place of the accident, which was near some mail boxes, being the point where the two children alighted from a school bus and were awaiting the passing traffic before going to their respective homes across the main travelled highway. See also *Maffioli v. George L. Griffith & Son, Inc.,* Supreme Judicial Court of Massachusetts, February 28, 1935, 194 NE page 726, which was a sudden appearance case involving a scooter used by a boy 8 years and 10 months and the facts of the appearance were very similar to those presented in the case at bar. The Court held that upon the entire record it could not properly be found that the accident was due to the negligence of the defendant and it is unnecessary to decide whether the plaintiff was in the exercise of due care. The trial Court in that case was held to have correctly directed a verdict for the defendant.

Appellant takes the position that the cases do not distinguish between persons who are walking across the road, who dash across the road or who crawl across the road. With this we must disagree. In the *White v. State of Maryland* case, 106 Fed. (2d) 392, cited by appellant, there was no evidence that the pedestrians using the highway made a sudden appearance and in fact the Court indicated that the jury must have found that the decedents were on the road for some distance and that the driver of the vehicle who was acquainted with the scene of the accident, either saw or should

have seen the decedents upon the highway and his failure so to do convinced the jury that the driver then was negligent. Without exception the other cases cited by the appellant in argument No. 2 indicate that a driver is bound to anticipate the presence of *others using the highway with ordinary care and prudence* as is pointed out in the *Butcher v. Thornhill* case, cited at 58 Pac. (2d) 179. The cases cited, and indeed the undisputed weight of the authority, is that the motorist must use due care and the pedestrian must likewise use due care. It is in failing to interpret the entire text and in reading out of context the instruction of the Court that the appellant finds her fault and accordingly there is no error in said instruction.

In appellant's argument No. 3 it is urged that the last clear chance instruction, as proposed in appellant's instructions Nos. 6 and 7, should have been given and in that respect the appellant recites *St. Louis and San Francisco Ry. Co. v. Starkweather,* 297 Pac. 815, and *Highway Const. Co. v. Shue,* 49 Pac. (2d) 203, which support the proposition that the plaintiff's case could properly be made out upon circumstantial evidence. The *St. Louis and San Francisco Ry. Co. v. Starkweather* case was a workmen's compensation case which smacked more of *res ipsa loquitur* than last clear chance, as indeed did the *Shue* case cited in appellant's brief. Under a proper set of facts the *Starkweather* case and the *Shue* case might be proper authority in Alaska for the propositions for which they stand. However they have no

application to the case at hand. In no place in appellant's brief does she set forth the circumstantial evidence which would warrant the giving of the requested instructions by the Court. We are therefore forced to the conclusion that the circumstantial evidence referred to by the appellant are the circumstances that an accident did in fact take place and that injuries resulted therefrom; and from these facts apparently appellant urges that they give rise automatically to an instruction on the last clear chance, but nowhere in appellant's brief is the evidence documented supporting this conclusion.

To support the proposition that the mere happening or occurrence of an injury does not in and of itself entitle the claimant to a verdict, attention of the Court is called to *Fair v. Floyd, et al.,* CCA 3rd, February, 1935, 75 Fed. (2d) 920. The Court there, while holding that the failure to give a requested instruction as follows:

> "The mere fact that an accident happened and that the plaintiff received some injury is not sufficient to permit the plaintiff to recover"

was not error. The Court clearly recognized that the theory of the offered instruction was correct and was in fact law, but stated that the requested instruction was merely a negative way of stating what the Court had already said affirmatively.

The Court's attention is also called to *Gordon v. General Launderers, Inc.,* March, 1941, Supreme Court of New Jersey, 18 Atl. (2d) 719. The Court there

labelled as not error the following requested instruction:

> "Negligence is never presumed but rather there is a presumption in favor of the defendant that he was not negligent."

The Court stated, and we quote:

> "As to this we think it was fully covered by the instruction of the court that the mere fact of injury did not entitle the plaintiff to a verdict, but that his action was based upon negligence and that it was necessary to establish that he was injured, and also that his injuries were due to the negligence of the defendant corporation * * *."

By analogous reasoning, if the mere happening of an accident and the injury of appellant does not entitle her to a verdict, neither should such circumstances entitled her to an instruction, not warranted by the facts, which might entitle her to a verdict by way of circuitous reasoning. Generally the law does not allow one to do indirectly that which is prohibited to be done directly.

While we might assume for the purpose of argument that the authority recited by appellant in her argument No. 3 may be good law in a cause which would warrant its application, we certainly cannot agree that the facts herein warrant such an application, and it goes without dispute that the appellant failed to recite any facts which would entitle her to the application of the law recited.

The law is, as appellees believe, undisputed that a trial Court correctly refuses to give a requested instruction where the instruction is not supported by the evidence, and certainly such a refusal is not error. See *Rudolph v. Wannamaker, et ux.,* 1925, Idaho Supreme Court, 238 Pac. 296; *Merchants & Bakers Guaranty Co. v. Washington,* 94 Pac. (2d) 930, 185 Okla. 532, 137 ALR 1123; *Gossett v. Van Egmond,* 155 Pac. (2d) 304, 176 Ore. 134.

The authority on this point is so ample that the only question is the difficulty of which source to cite. Appellees further call the attention of the Court to the rule that an instruction not based on any evidence is improper and should not be given to the jury. *Porter v. Terminal R. Ass'n. of St. Louis,* 65 NE (2d) 31, 327 Ill. App. 645. Accordingly the obvious conclusion is directly the converse of the position of the appellant and if in fact the instruction requested in appellant's argument No. 3 had been given, as set forth in plaintiff's offered instructions Nos. 6 and 7, the same would have been prejudicial error so far as the appellees are concerned.

Appellant's argument No. 4 is based on the proposition that the Court erroneously gave instruction No. 5 and urges that it is the uncontradicted evidence that the children and grownups in the vicinity cross the Spenard Road at a point near the foot of Romig Hill. Again we are unable to pinpoint the appellant's argument in respect to the facts, as no documentation from the record is given. There was an attempt on the part of the appellant on rebuttal examination of

the girl, to obtain testimony that she always crossed the road at a certain point (R 298). The offer of evidence was properly denied for the reason that it had no bearing upon where the girl crossed the road at the time of the accident, and further the mere fact that a sole individual may by habit or instinct cross a highway at a given point for any length of time, on its face fails to show that it is the long established custom of the community to cross a road at a particular point, or that the habit or custom of the community is controlled by the individual who, through habit or inclination, makes that given point a crossing, and by no stretch of facts or argument could it be urged that motorists should under such circumstances be acquainted with the individual habits of a particular person.

Appellant further urges, under argument No. 5, that the Court erred in excluding competent evidence offered in rebuttal by the appellant and in this regard appellees call the attention of the Court that in a discussion between the Court and counsel in the lower Court, that counsel for the appellant presumed that 15 minutes would be sufficient for his rebuttal testimony (R. 285). This part of the transcript was merely an attempt to determine between Court and counsel the matter of time, which is usual and customary particularly in the District Court for the District of Alaska, Third Division, where the Court's calendar is crowded and the Court frequently attempts to determine in advance the amount of time required for any particular presentation, in order that the way

may be made clear for other litigation pending. Reading the transcript in its most favorable light to the appellant, there was nothing prejudicial in the action of the Court, and the Court specifically stated at one point in the discussion as follows:

> "The court only has objected to what you state by virtue of the fact that it is surplusage. Now, if you have any rebuttal testimony that you desire to put on at this time, you may do so. But the court must limit you to rebuttal testimony and a lot of new material is not relevant." (R 304)

If the language of the Court above quoted did not clearly indicate to appellant's counsel that he was at liberty to proceed, then appellees are at a loss to understand the intent of the Court, as the words therein expressed, taken in their ordinary, usual meaning, could convey no other thought. The language is unmistakably clear that the appellant was at liberty to proceed with any proper testimony that might rebut the case in chief of the defendants.

On page 21 of appellant's brief, the situation presented is whether or not Mrs. Van Dolah Gordon was crying at the scene of the accident. This series of questions arose apparently out of the testimony of Mr. Read (R 181) at which point Read indicated that a woman whom he thought to be the mother of the girl in question was crying, and accordingly appellant sought to impeach the testimony of Mr. Read in respect to this collateral evidence. It is difficult to understand the position of the appellant as to what possible good or effect could be accomplished by show-

ing that Mrs. Van Dolah Gordon did not cry at the scene of the accident and that the woman who was with her did not cry, so far as he knew. Mr. Read only testified that a woman whom he took to be the girl's mother was crying. In any event the testimony was already before the jury and although the objection was sustained, the Court did not instruct the jury to disregard the testimony already given as indicated on page 20 of appellant's brief by underscore.

Now, let us review the transcript which appellant recites in part in her brief, pages 13 and 14. This portion of the transcript is found at R 284-287. The transcript here in all respects shows a perfectly normal exchange between Court and counsel, with the possible exception that in response to the Court's first question (R 284) at the bottom of the page, appellant's counsel misunderstood the Court. It is evident that the Court inquired as to how much time would be required for rebuttal and speculated on 10 minutes. Mr. Bell apparently understood the Court to indicate that the appellant would have 10 minutes to argue the case to the jury.

Appellees fail to see where this exchange of conversation is any more prejudicial than the Court's statements to appellees' counsel found at 272-274 of the record, where counsel for appellees over-urged a point already ruled upon by the Court, and the Court properly cut appellees' counsel short.

Appellant quotes a substantial portion of the record —292-296. The only portion alleged to be objection-

able according to appellant's underscores, appears at R 296, where the Court advised Mr. Bell in substance that he should not state before the jury that the drawings made by previous witnesses were out of proportion and that the drawings made by other previous witnesses might confuse Joann Van Dolah. The court no doubt felt that Mr. Bell was either arguing the prior testimony of the witnesses to the jury at an improper time or that Mr. Bell was in effect giving testimony or opinion on the prior drawings or sketches illustrative of the testimony of witnesses. In either event the Court quite properly instructed the jury to disregard the statement of counsel.

At pages 298 and 299 of the record, the Court refused to allow a drawing made by the appellant during noon recess to go into evidence as rebuttal. The Court at this same point sustained an objection to a question by appellant's counsel (R 298):

> "Did you cross farther down going over or do you * * * I will withdraw it. Do you always cross at a certain place?"

Mr. Bell then indicated that the witness had answered the question and the Court instructed the jury to disregard the answer.

In respect to the latter situation, to which appellant took exception, there was no proper foundation laid for such a question and appellant's counsel was obviously laboring with attempted proof that Joann Van Dolah, without exception in her life, crossed the road in question at a particular point. Aside from

being somewhat hard to believe, if true, the testimony had no place in rebuttal. It is interesting to note the prior testimony of the same witness at R 295.

At this point the same witness was asked:

> "Now, is there any path or trail that you follow through there or was there at that time a trail, a regular trail, that you followed through?"

The answer of Joann Van Dolah was:

> "Not especially but most of the children just went that way." (R 295).

It is quite obvious that the girl had answered the question as best she could, but there is a point at which the human mind will not resist the power of suggestion and accordingly rules of evidence were developed to guard against suggestion in the form of leading questions. It is to be noted that the above quoted question and answer did not involve a pedestrian road crossing but a path leading to a small house or dwelling on the Werenburg property.

At page 18 of appellant's brief, there is recited with emphasis a quotation of a statement of the Court found at Record 301:

> "That is not true."

Appellant is claimed to have been prejudiced by such remark on the part of the Court. As the appellees now read the record, no determination can be made as to whether the Court was taking issue with counsel for appellant or counsel for appellees. It is

plain that the Court favored the position of Mr. Bell on the question of whether or not Mr. Read testified that he was in the last driveway. This matter is resolved in Mr. Bell's favor (R 302):

> "The Court. Well, the court's recollection is, and the court could be wrong, on the position of Mr. Read was that it was in the last driveway."

Since the Court obviously agreed with Mr. Bell it follows that the emphasized quotation at R 301:

> "That is not true"

was intended as an impeachment of Mr. Hughes' recollection of the testimony. While it is a matter of small moment, appellees submit that at no place in the record does Mr. Read state he was in the last driveway (R 196, 204, 214). The appellees further submit that Mr. Read's testimony at R 197 clearly indicates a driveway above the one in which he parked. Certainly if the cab pulled off the road twenty-five feet above Mr. Read on the hill there was either a driveway or a parkway. It would therefore appear that while the Court agreed with Mr. Bell and disagreed with Mr. Hughes, both the Court and Mr. Bell were in error, and if Mr. Bell or the appellant were harmed by a statement directed against Mr. Hughes, the blame should not be laid at the door of the appellees by reason of Mr. Hughes having properly stated the testimony of appellees' witness.

Any doubt that the jury may have had in respect to the exchange above mentioned should have been dispelled by the Court (R 302):

> "Let the record show that the court ruled upon the objection as being that the question was not proper rebuttal and not as to the statement."

At page 25 of appellant's brief there is quoted certain portions of the record found at R 303, 304 and 305. The interrogation attempted by appellant is obviously examination in chief which the Court properly refused and there resulted an instruction of the Court to Mr. Bell that he should not make statements of a certain nature before the jury. The statement referred to by the Court was of course one upon which the tongue of a clever trial lawyer could hang the rich drippings of pathos (R 303):

> "This is the most important thing on earth to this little girl."

Mr. Bell took exception and referred to his 39 years of practice; the Court responded and Mr. Bell had the last word. By any fair standard, it appears that this exchange could be declared a draw without damage to either side.

The law recited in appellant's argument number 5 is embraced largely in the cases of *Collins v. State,* 54 So. 665, and *Shepard v. Brewer,* 154 SW 116.

The appellees submit that there is no reasonable comparison between the state of the record as recited by appellant and the authority cited by appellant in respect thereto. Appellant cites *Collins v. State,* supra, which was a criminal case in which the trial Court, on motion of defense counsel to delay a criminal trial by reason of the absence of a material witness, placed

the defendant on the stand in the presence of the jury and put to the defendant certain questions in respect to her knowledge of relations with one Bill Hinton. The judge in substance asked such questions as:

> "Hinton is a white man, isn't he and you are a nigger, aren't you?"

And by inference and innuendo in his questions intimated that there was a rather intimate relationship between the defendant and the absent witness. The cited case has no application since it deals with a defendant in a criminal case and not with counsel and while we take no particular exception to the rule as laid down in *Collins v. State,* it has little to offer by way of assistance to either party herein.

In *Shepard v. Brewer,* supra, the Court in trying out a defamation suit, threatened or intimated that the plaintiff's counsel was guilty of contempt or might be subjected to punishment for contempt. No such an inference can be drawn from the record herein and it is submitted that there is considerable difference between threatening counsel for contempt and merely disagreeing with counsel or telling counsel that he is wrong. If in fact the trial Court were held to such a standard of decorum that it could not with propriety control the proceedings of the trial and could not rule upon the evidence to be introduced at the time of trial without argument, then indeed the province of the trial Court has been seriously invaded. It is submitted by the appellees that the trial Court properly ruled on the evidence in question although, as is indi-

cated by the record, in a quick exchange of comments, there is some difficulty in determining why an argument took place to begin with. It appears to the appellees from a review of the record that the appellant's counsel was in a large measure responsible for any exchange of language between Court and counsel. It would appear further that appellant's counsel takes the position that the Court is not at liberty to take issue with either of counsel even if said counsel is in error, and that it is prejudicial for the Court to say that counsel was wrong or that the statements made by counsel were not true. Neither the cases cited nor the weight of authority support appellant in this.

The appellees contend that the Court exercised its sound discretion properly in refusing to allow the jury to go to the scene of the accident.

It is submitted that the accident took place on the 5th day of October, 1951, at a time when there was no snow on the ground. The trial was had in December of 1953, more than two years later, at a time when the snow plows had stacked the natural accumulation of snow high on the shoulders of the road. While this fact is not in evidence except as to the lapse of time, it is a position of fact that cannot be denied by the appellant.

Due to the lapse of time and the condition of the terrain, it is most doubtful whether any good could have been accomplished by taking the jury to the scene of the accident. The jury had before it large gloss

prints of the scene of the accident taken by a commercial photographer at or near the time of the accident. There had been ample coverage of the facts by witnesses on both sides. Under the circumstances the case does not fall within the rule of *Nash v. Searcy,* 75 SW (2d) 1052 cited by appellant. It is further worthy of note that appellant made no timely motion to the Court, even as late as the last noon recess prior to which time the Court had advised counsel that it expected to have the case to the jury by 3:00 P.M., no word was heard from appellant except that she desired about 15 minutes in rebuttal and could hold herself to 45 minutes on argument.

CONCLUSION.

There is no error. The case should never have gone to the jury. The appellees respectfully submit that the verdict and judgment of the lower Court should be affirmed.

Dated, Anchorage, Alaska,
October 29, 1954.

DAVIS, RENFREW & HUGHES,
By JOHN C. HUGHES,
Attorneys for Appellees.